UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-84-45-R
MARTIN ELECTRONICS, INC.	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - Federal Enforcement When Delegated State Has Already Taken Enforcement Action. Where a delegated state has taken timely and appropriate enforcement action, the EPA is precluded from filing an independent Federal complaint arising from the same violation.

2. Resource Conservation and Recovery Act - Federal Enforcement in Delegated States. Determining whether or not a state action is timely and appropriate requires a careful examination of all elements of such state's efforts.

3. Resource Conservation and Recovery Act - Federal Enforcement in Delegated States. Agency guidance establishes that EPA is closely restrained in commencing parallel Federal actions on the sole basis of the perceived inadequacy of the penalty assessed by the state.

4. Resource Conservation and Recovery Act - Assessing Multiple Penalties. Agency penalty policy forbids the assessment of separate penalties for multiple violations stemming from an activity which is not substantially distinguishable from any charge in the complaint for which a penalty is to be assessed.

5. Resource Conservation and Recovery Act - Penalty Assessment. Penalties for failure to notify under § 3010 of the Act and for several record-keeping deficiencies are herein assessed.

6. Resource Conservation and Recovery Act - Discrepancies in Facility Manifests. Where a manifest contains some apparent inconsistencies which are logically and reasonably explained, no penalty should be assessed.

7. Resource Conservation and Recovery Act - Closure. When a delegated state agency advises a facility to begin closure prior to the expiration of the required 180-day waiting period based upon rationale and environmentally sound reasons, no penalty should be assessed therefore.

Appearances:

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Atlanta, Georgia
For the Complainant

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For the Respondent

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For the Respondent

INITIAL DECISION

This proceeding is a civil administrative action for a compliance order and assessment of penalties pursuant to § 3008(c) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928(a)(C) and the Consolidated Rules of Practice, 40 CFR 22 et. seq. The action was initiated by the Director of the Air and Waste Management Division, United States Environmental Protection Agency (EPA), Region IV (Complainant) on June 6, 1984 by filing a complaint and order against Martin Electronics, Inc. (MEI) of Perry, Florida.

The complaint after stating that the Respondent enjoyed interim status under the regulations went on to describe the results of inspections of the Respondent's facility conducted on February 9, 1984 and March 14, 1984 by the Florida Department of Environmental Regulation and EPA. The inspections alledgedly revealed the following violations. (1) The Respondent's waste analysis plan did not address the waste solvents being stored as required by 40 CFR 265.13 and § 17-30.18 of the Florida Administrative Code (FAC). (2) Respondent's waste analysis plan did not specify an adequate frequency for which their initial analysis of the waste will be reviewed or repeated

to insure that the analysis is [illegible] up-to-date as required by 40 CFR 265.13(b)(4) and § 17-30.18 FAC. (3) The Respondent's written inspection schedule which was developed pursuant to the regulations did not include provisions for inspecting the waste solvent storage areas as required by 40 CFR 265.15 and § 17-30.18 FAC. (4) Respondent's personnel training program did not include training in procedures for inspections, repairing and replacing facility emergency and monitoring equipment as required by 40 CFR 265.16(a)(3)(i) and § 17-30.18 FAC. (5) The Respondent had failed to make arrangements with a fire department (or documented that the authorities declined to enter into such agreements or arrangements) as required by 40 CFR 265.37 and the relevant sections of the FAC. (6) Respondent's contingency plan did not address the waste solvents being stored at the facility and, therefore, did not fulfill the purpose for having a contingency plan described in 40 CFR 265.51(a) which was adopted by the relevant portions of the FAC. In addition Respondent's contingency plan did not describe arrangements agreed to by local fire departments. (7) Respondent's contingency plan had not been submitted to all the local authorities decribed in 40 CFR 265.53(b) as adopted by the relevant sections of FAC. (8) A copy of manifest number 02313 representing a March 12, 1984 shipment of waste solvents contained a quantity discrepancy which was not signed nor dated by the generator; the manifest representing the March 12th shipment of contaminated soil also contained a quantity discrepancy in violation of relevant Federal and State regulations. (9) Respondent had failed to maintain any of the groundwater monitoring requirements contained in 40 CFR 265 Subpart F and relevant requirements of the FAC as of the February 9, 1984 inspection. (10) Respondent's closure plan did not contain a complete and accurate estimate of the inventory of wastes in storage and did not otherwise address the waste solvents as

required by 40 CFR 265.112(a) and the relevant sections of FAC. (11) Respondent's closure plan was not submitted at least 180 days before closure as required by 40 CFR 265.112(c) and the relevant provisions of FAC. (12) Respondent's inspection schedule for their hazardous waste treatment system did not include provisions for a weekly inspection of the construction materials of the tanks or the area immediately surrounding the containment structures as required by 40 CFR 265.194(a)(4) and (5) and the relevant portions of the FAC. The complaint suggested a civil penalty of $72,500.00 be assessed.

By answer dated July 11, 1984 the Respondent, through its attorney, filed an answer which denied most of the elements of the complaint and admitted three. The answer also contested the amount of the penalties as being inappropriate and requested a hearing. A hearing on this matter was held on February 20-21, 1985 in Atlanta, Georgia. Following the availability of the transcript, initial submissions of findings of fact, conclusions of law and briefs in support thereof and replies were exchanged between the parties and filed. In entering this initial decision, I have carefully considered all the matters in the record, the briefs and the proposed findings filed by the parties and all proposed findings of facts or conclusions of law inconsistent with this decision are rejected.

Factual Background

The Respondent, Martin Electronics, Inc. (MEI), maintains a place of business at Puckett Road in Perry, Florida for the manufacture of ordinance and pyrotechnic devices. In August of 1980 pursuant to statutory requirements, MEI notified the EPA that it generated and managed hazardous wastes and in November of 1980 MEI filed a Part A hazardous waste permit application

with EPA in order to obtain interim status for its facility as required under § 3005 of the Act. MEI generates four to five drums per year of waste tuloine and acetone solvents which are listed hazardous wastes due to their volatility. Based on its own understanding of the regulations and advice obtained from consultants, MEI did not file a notification of hazardous waste activity concerning these solvents because it was their interpretation that the company was exempt from notification under the "small quantity generator" exemption as set forth in 40 CFR 261.5. At the time of its application, MEI advised EPA that it was generating and treating hazardous waste sludges from its chrome-plating operation. The sludge drying beds which the company maintained were required to have associated with them a groundwater monitoring system since the sludges involved were considered hazardous by the Agency due to their chromium content. MEI had the sludges analyzed and found very low levels of hexavalent chromium and therefore felt that the sludge would meet the EPA guidelines for de-listing. Had the de-listing petition been acted upon favorably by EPA, the Respondent would have had no responsibility under the Act to maintain a groundwater monitoring system in association with the sludge drying beds.

The Respondent retained Environmental Science and Engineering, a national environmental consulting firm, to assist it in its efforts to comply with the RCRA regulatory program and to prepare a de-listing petition for filing with the USEPA. On February 28, 1983, MEI filed a de-listing petition with the EPA to have the chromate sludge de-listed as a hazardous waste. Subsequent to the filing, the Agency advised MEI that the petition was incomplete and required that they file additional information to assist the Agency in making a final determination on the de-listing petition. This additional information was never provided to the Agency and, consequently, no action was ever taken

by EPA on MEI's de-listing petition. The chromate sludge drying beds are a hazardous waste facility which requires the installation of a groundwater monitoring system. Such system was required to be in place as of October 19, 1981.

The facility has been inspected by the State of Florida on several occasions prior to the two inspections giving rise to this complaint and several deficiencies were noted in the inspection reports. The State of Florida was aware that MEI did not have a groundwater monitoring system in place and was also aware that MEI had applied to EPA to have its waste sludge de-listed. In the correspondence between the State agency and the Respondent, mention is made on several occasions of the requirement to have the groundwater monitoring system in place absent a favorable ruling on the de-listing petition by EPA. One of the inspection reports prepared by a Florida State inspector had the notation at the bottom that the groundwater monitoring requirements "were postponed until a final ruling on the Respondent's de-listing petition". The Respondent argues that this notation indicated that the State agency would not consider them to be in violation for failure to have a groundwater monitoring system while its petition was being reviewed by EPA. The Complainant argues that this notation simply indicates what the inspector was told by the Respondent's employees at the time of his inspection and does not represent a policy decision on the part of the State agency to excuse the absence of the groundwater monitoring system.

Following several warning letters sent to the Respondent by the State agency, the two parties met on several occasions and finally in December of 1983 MEI signed a consent order with the State agency which required the Respondent to install a total of three groundwater monitoring wells and, in essence, install and have in operation a groundwater monitoring system meeting

the requirements of the State and Federal regulations. The consent order was modified at the request of USEPA to include a requirement that MEI install four groundwater monitoring wells rather than the three originally specified by the State consent order. The consent order was modified to reflect EPA's request and the final agreement was executed by MEI on March 24, 1984 and by the State agency on March 26, 1984.

Pursuant to § 3006(C), the State of Florida was granted Phase 1 interim authorization effective May 19, 1982. This authorization authorized the State of Florida to operate its own hazardous waste program in lieu of the Federal program for Phase 1. Phase 1 consisted of those requirements promulgated by EPA on May 19, 1980 including standards for generators, owners and operators of treatment of storage disposal facilities. Prior to the inspections in February and March 1984, which gave rise to the issuance of this complaint, the Respondent dealt solely with the Florida State agency, as envisioned by the statute, and had no direct dealings with EPA concerning the operation of its facility with the exception of the filing of the de-listing petition which the statute requires be filed with the Federal Agency, rather than the State. The consent agreement ultimately executed between the Respondent and the State of Florida, in addition to the requirements concerning the installation and operation of a groundwater monitoring system, required that the Respondent pay the State of Florida an administrative fee in the amount of $107.00. Apparently, the statutes and regulations of the State of Florida do not authorize the Agency to collect civil penalties under the circumstances of this case, but rather to merely assess whatever administrative costs the State incurred in bringing the facility into compliance and in the preparation and ultimate execution of the consent document.

Since the Respondent had entered into a valid consent decree with the State of Florida prior to the bringing of this action by EPA, the Respondent filed a motion to dismiss the complaint on the basis of res judicata since the primary subject matter of the complaint had been already concluded with the State of Florida and that, therefore, the Agency had no jurisdiction to bring another action based on the same violation. In support of the motion, the Respondent cited the Court's attention to a prior decision[1] by one of the EPA Administrative Law Judges on a similar fact situation arising in Region IX of EPA wherein the Judge upon a similar motion dismissed the complaint since it dealt with the same subject matter of a prior state/respondent consent decree. After reviewing the briefs and arguments of the parties on the issue, the undersigned denied the motion to dismiss on several grounds, not the least of which was that the cited decision had not been acted upon by the Administrator and, therefore, did not, at that point in time, represent final Agency action. Since the conclusion of the hearing in this case, however, the Agency has issued a final order[2] on the other case which decision is binding on the undersigned. A further discussion of this point will be made later in this decision.

The record indicates that on the occasion of the March inspection of the facility, prior to the issuance of the complaint, the groundwater monitoring system had been installed and a State inspection subsequent to the issuance of the complaint and, prior to the hearing, further indicated that the Respond-

[1] In Re BKK Corp., Docket No. IX-84-0012

[2] May 10, 1985.

Threshold Legal Issues

As indicated above, since the conclusion of the hearing, the Agency has rendered a final decision in the matter of BKK. The final decision of the Agency in the BKK matter has provided the undersigned with additional guidance and precedent which is binding upon him and must be considered in resolving this matter.

The facts in the BKK decision are practically identical to those in this case. In that case the State of California and the EPA Region IX inspected the Respondent's hazardous waste facility and based on that inspection it was determined that BKK was in violation of various provisions of RCRA, and the Region so notified the State. The State of California responded to the Region's notice by entering into a settlement agreement with BKK, after first threatening to bring an enforcement action against the company. Dissatisfied with the settlement agreement, the Region subsequently initiated its own enforcement action by filing an administrative complaint against BKK.

BKK filed, a motion for judgement as a matter of law claiming that the State had primary enforcement authority under RCRA and that since the State took adequate enforcement action in this instance, i.e., executed a settlement agreement with BKK, EPA was precluded to taking any enforcement action of its own. The Presiding Officer agreed and granted BKK's motion and dismissed Region IX's administrative complaint. On appeal to the Administrator, the Agency upheld the Presiding Officer's decision and agreed that the complaint should have been dismissed.

In my original order denying the Respondent's motion based on the BKK decision, I set forth several grounds for my reasons for rejecting the motion. The detailed discussion which appears in the Agency's Final Decision on the

BKK matter resolves the issues which caused the Court in this case to deny the Respondent's motion and, therefore, the Court must now re-assess its previous ruling in light of the language contained in the BKK Final Decision.

In the BKK case, the State of California, like Florida, apparently has no authority to assess civil penalties, as such, in reaching administrative consent decrees which are not the subject of court action, but rather have the authority to assess against a facility appropriate administrative costs incurred by the State in concluding the agreement. In the BKK situation, the State of California assessed administrative costs of $47,500.00. The Final Agency Decision stated that although this sum is not characterized as a penalty it is tantamount to one, and any difference between the meaning of the term cost and penalty is largely sematic.

In the instant case, the State of Florida assessed an administrative cost of $107.00. The Agency, in its complaint, had proposed a penalty of approximately $48,000.00 for the groundwater monitoring violations alleged in the complaint. $27,500.00 of that amount was for the civil penalty itself and the remainder was characterized as a sum equaling the economic savings that the Respondent incurred by failing to install the groundwater monitoring system over the years when it was required to do so.

The applicability of BKK to this case is inescapable and clear. The only real issue before me, at this juncture, is whether or not the action taken by the State of Florida was timely and appropriate. My review of this record indicates that the timeliness aspect of the State action is not an issue and, therefore, the only aspect of the requirements that I need to consider has to do with whether the State action was appropriate. As indicated earlier, the consent decree between the State of Florida and the Respondent, MEI, required that MEI immediately install and operate a compre-

hensive groundwater monitoring system, which it immediately proceeded to do, and even as early as the date of the EPA/Florida joint inspection in March 1984, all of the required wells had been drilled and shortly thereafter the entire groundwater monitoring system was in place and operating. Therefore, the primary objective sought by EPA in its complaint, i.e., the curing of the violations alleged had been accomplished prior to the issuance of the complaint in so far as they relate to the groundwater monitoring system. The only issue remaining is whether or not the rather nominal administrative costs assessed by the State of Florida would render their action inappropriate given the rather sizeable civil penalty proposed by the Agency in its complaint.

This notion was discussed at some length in the BKK decision on page 10, wherein the Administrator stated that:

> "As an alternative to its 'blanket' claim of unfettered authority, the Region claims that EPA can at least take enforcement action when state action is inadequate. I agree. In this case, far from being inadequate, the State's action was reasonable and appropriate."

The quoted material has a footnote which states that the Respondent, BKK, has expended a good deal of time and expense in an effort to fully comply with the State action and it was asserted without challenge that BKK had expended or will expend over a million dollars to comply with the agreement. The footnote goes on to say that fundamental fairness surely requires EPA to stay its hand in circumstances where the State's action is reasonable and appropriate and a party has made or is making goodfaith efforts to comply with such action.

On page 11 of the BKK decision, a footnote takes notice of the fact that since the issuance of the complaint, the Agency has issued more detailed guidance to the Regions on what enforcement actions are appropriate or adequate for specific kinds of RCRA violations. The footnote further states

that, in general, these documents encourage EPA enforcement if state action is not timely, does not remedy environmental harm or is not sufficiently vigorous to remove economic benefits accruing from violations or to deter repeat violations. The footnote then goes on to identify the policy documents and guidance referred to. The Court has, with some difficulty, obtained some of the documents and read them in the hope that they would provide some guidance to it in resolving the question of whether or not, all things being equal, the mere perceived inadequacy of a state levied penalty is sufficient grounds for EPA to issue an independent complaint of its own arising out of the same factual situation.

One of the documents identified by the Administrator in his Final Decision on BKK was a June 26th memorandum from Alvin Alm, Deputy Administrator of EPA, on the subject of "Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement 'Agreements'." The memorandum has a separate chapter identified as "Criteria for Direct Federal Enforcement in Delegated States" and that section describes seven or eight types of cases where EPA might decide to take direct action. They involve such situations as violation of an EPA order or consent decree, where the state requests EPA to intervene, significant economic benefits gained by the violator, repeat violators, areas where state authority may be inadequate and so forth. There is then a subsection entitled "Adequacy of Penalty". This subsection states in pertinent part as follows:

> "For types of violations identified in national program guidance as requiring a penalty or equivalent sanction, EPA generally will not consider taking direct enforcement action on the basis of the adequacy of the amount of penalty imposed unless clear national guidance has been defined, in consultation with States, and is being applied in practice in EPA Regions. EPA may, however, take direct enforcement action for recovery of additional penalties in instances in which a State penalty is determined to be grossly deficient e.g., de minimis, after considering all of the circumstances of the case and the national interest. In

making this determination, EPA will give every consideration to the State's own penalty authority and any applicable State penalty policy.

"In FY 1985, except for the limitation noted above, the Agency will focus on whether the State has imposed a penalty in appropriate cases and not on the amount of the penalty for the purposes of considering direct action unless guidance on penalty amounts applicable to States is in place."

In another document, identified in the BKK opinion from Lee Thomas, then Assistant Administrator, dated December 21, 1984, entitled "Enforcement Response Policy", Mr. Thomas states, in a footnote to the section entitled "EPA Action in Authorized States", that:

"EPA may also consider assessing a penalty if it feels that the penalty assessed by the State was egregiously small, as judged according to the State's penalty policy or procedures established by the State for determining penalty amounts. Before initiating any penalty-only action, EPA must weight the benefit of that action with the need to take action against handlers that are out of compliance with applicable requirements."

My understanding of these policy memoranda suggest that the Agency recognizes and authorizes EPA to take independent and direct Federal action against violators in a delegated state, based on the perceived inadequacy of the penalty assessed by the state, only in very limited circumstances. In the instant case, the Agency apparently felt that the administrative cost assessed by the State of Florida was insufficient. However, as pointed out above, the Agency is limited, in seeking an additional penalty where the state has already acted, to those situations where the penalty assessed by the state was egregiously small. Such determination must be judged according to the state's penalty policy or procedures established by the state for determining such matters. The Agency, at the time it approved the Florida State RCRA program, was aware of the limitations that the State program had relative to its ability to assess penalties associated with negotiated administrative consent decrees. The Agency had to have known that the State could not assess civil

penalties in such cases, but was rather limited, by the regulations, to the assessment of administrative costs associated with such agreement. There is nothing in the record to suggest that the State of Florida in any way failed to assess the highest administrative costs available to it associated with the consummation of its agreement with the Respondent. Consequently, applying the above-cited criteria, there is nothing in this record to suggest that the administrative costs assessed was egregiously small when judged by the State's policy and legal limitations. It should be noted, however, that in a similar situation the State of Calfornia was able to successfully support an administrative cost assessment of almost $48,000.00 whereas the State of Florida was only able to come up with $107.00. It seems to me the that Florida officials could benefit substantially from conferring with its colleagues in California to determine just what that State considers to be the elements permissably included in arriving at an administrative cost assessment. Apparently the criteria in California must be a little broader than that used by the State of Florida.

In any event, based on the record before me, I can not legitimately say that the administrative cost (penalty) assessed in this case by the State of Florida was egregiously low when judged by the State's policy associated therewith. If the record had shown that the State of Florida was legally permitted to assess civil penalties amounting to several thousand dollars despite that only assessed a penalty of a hundred dollars then I think a legitimate case could be made for the notion that they had levied an inadequate fine.

The Agency guidance also suggests that in determining whether or not a State penalty is grossly deficient, the Agency must consider all the circumstances of the case and the national interest. Certainly there is nothing

involved in this case which has any of the indicia of a grave and important national policy issue. In addition, the circumstances surrounding the violation concerning groundwater monitoring are not particularly clearcut. The Respondent had, from 1980 until 1984, dealt exclusively with the State agency in regard to its RCRA responsibilities, a circumstance completely in keeping with the intent of Congress when it established the state delegation process. As noted above, the Respondent was deligently pursuing a de-listing petition with EPA, which would have relieved it of the responsibility to install a groundwater monitoring system had such petition been acted upon favorably. The Respondent spent over $12,000.00 dollars with its consultant in the furtherance of its trying to have its waste de-listed. It received from the State of Florida what could be charitably characterized as "mixed signals" regarding its responsibility to install groundwater montoring during the pendency of its de-listing petition with EPA. This fact was testified to by the author of several of the letters from the State of Florida to the Respondent wherein the State official admitted that MEI could have been "confused" by the language it found in its correspondence with the State regulatory agency. In any event, the record is equally clear that when MEI was finally advised, without equivocation, that, regardless of the fact that it had petitioned to have its wastes de-listed with EPA, it was still required to install and maintain a groundwater monitoring system; it did, in fact, install and operate such system in a very short period of time following the final execution of its agreement with the State of Florida. The relevance of this discussion is that the administrative costs assessed by the State of Florida is, in absolute terms, relatively small compared with the almost $48,000.00 that the Agency proposed in its complaint. This comparison is only valid when one assumes the accuracy of the Agency's penalty determination. Given the

factors which the Agency penalty policy requires must be considered, it occurs to me that the Agency's proposed penalty is considerably higher than the facts in this situation would warrant. For example, the Agency attributed over $20,000.00 of the total $48,000.00 proposed, relative to the groundwater monitoring violation, as economic benefit from non-compliance. Given the fact that the Respondent spent approximately $12,000.00 in an attempt to have its waste sludge de-listed, an expense which brought them no reward, they enjoyed little or no economic benefit from failing to install this system at the time the Agency felt they were required to do so. In addition, the Agency increased the maximum penalty indicated in the penalty guidance of $25,000.00 to $27,500.00 based on culpability and lack of cooperation. Under the circumstances, I do not feel that those increases were justified and I have serious doubt as to whether or not the Agency was correct in assessing a base penalty of $25,000.00 in the first place. Assuming, arguendo, that I would, if required to do so in this case, substantially reduce the penalty proposed by the Agency, the discrepancy between the two numbers would have become less significant.

The statute also requires the Agency to notify a delegated state of its intention to bring an action against a facility located in such state prior to the bringing of an action. The Agency did so in this case and received a reply from the State of Florida to the effect that the State agency had two concerns with EPA's proposed action: one, being that, "would EPA's proposed corrective action be in conflict with those to which Martin has already agreed with the Department?"; and secondly, in view of the signed consent order, "is enforcement against Martin an appropriate exercise of EPA's enforcement efforts in Florida, given the number of other sites in the State that are not currently subject to either State or Federal enforcement at this

time?" The State then asked that they be given the opportunity to discuss and resolve these questions with EPA prior to EPA's bringing the action that it intended to against the Respondent in this case. (See Complainant's Exhibit No. 4B.) Although the statute says that EPA must give such notice, it does not go on to say what EPA should do if the state objects to such action. Given the tenor of the two above-cited Agency policy guidance memoranda, which suggest that the maintenance of cordial state and Federal relations are a linch-pin of the Agency's intentions under RCRA, it would seem that the Agency might have been over-zealous in bringing this action under the circumstances in this case since the State agency had already:
(1) entered into a consent agreement which resolved the primary concerns of EPA; and (2) the existance of the State's written objections to the bringing of such action.

In view of all of the above discussion, I am of the opinion that the Respondent's renewed motion to dismiss that portion of the complaint having to do with the groundwater monitoring violations should be granted. The granting of this motion is based upon several factors—one of which is the rather clear language contained in the BKK, supra., and secondly, the fact that the State's action in this regard was, in my judgement, both timely and appropriate even though the discrepancy between the absolute numbers associated with the penalty aspects of this case appear to be great. In conformance with the Agency policy guidance on the question, it appears that the nominal "penalty" assessed by the State of Florida is, in this case, not sufficient justification for the Agency to bring a duplicative and parallel enforcement activity in regard to this violation. As pointed out in the BKK decision, at page 4:

"If the Agency had unfettered authority to act in the face of reasonable and appropriate state action, a party could never rely upon such state action to finally resolve a controversy. This would chill the willingness of a party to put forth the effort and expenditure necesary to comply with a state's enforcement action, thereby frustrating RCRA's legislative design in which states were to 'take the lead in the enforcement of the hazardous waste laws.'"

Having resolved the groundwater monitoring issue, we must now discuss the other legal proposition raised by the Respondent to the effect that the various violations identified in the complaint and for which separate penalties were assessed, relative to the the solvent violations, are in conflict with the Agency's policy and general law concerning multiple penalties for events arising out of the same factual situation. In this case, the Agency has assessed approximately $18,500.00 associated with the Respondent's failure to notify the Agency that it generated and stored spent solvents on its premises. Specifically, the Agency proposed to assess a fine of $6,500.00 for the failure of the Respondent to notify the Agency under Section 3010 of Act of the fact that it was generating and storing spent solvents on its facility, an additional $6,500.00 penalty for the failure of the Respondent to disclose the same fact in its Part A application, and thirdly, a penalty of $5,500.00 for the failure of the Respondent's closure plan to address how it proposed to dispose of the spent solvents. The penalty policy applicable to this case states that the Agency should not assess a separate penalty for each violation unless such violation results in an independent act by the violator and is substantially distinguishable from any charge in the complaint for which a penalty is to be assessed. The guidance goes on to say that multiple penalties are not appropriate where the violations are not independent or substantially distinguishable. Where a charge derives from or merely states another charge, a separate penalty is not warranted. An example of such a situation is explained in the penalty policy where a facility had

failed to implement a groundwatering system. As a result of such failure, it also failed to install monitoring wells, to obtain samples, had no outline of the groundwater quality assessment program, and no records kept or report submitted to the Agency all of which are separate violations. The policy states that all of the violations arise from the same set of circumstances and because the company did not install any wells, sampling analysis could not occur and without sampling and analysis, the company did not have information in which to prepare a quality assessment program outline, keep records or submit reports to the Agency. Therefore, the guidance suggests that the violations are not independent and substantially distinguishable and a single penalty is appropriate, with each section of the regulation that was violated as cited in the complaint. In other words the company should be fined for failure to implement a groundwater monitoring system and not for all of the failures that would naturally flow from the lack of such a system.

In the instant case, the Respondent failed to notify the Agency of the fact that it was generating and storing spent solvents on its premises which the Respondent used to clean parts and thin paint. The Respondent only generated about 200-250 gallons of this material a year and its reading of the regulations, in conjunction with the advice it received from its consultant, led it to the opinion that the generation of such small quantities of materials would place it outside of the regulations due to the existence of the "small quantity generator exemption". The Respondent made no effort to conceal the existence of the drums of solvent on its facilities and when asked what such drums contained, readily told the State and Federal inspectors of their contents. It was only after the joint State/Federal inspection that the Respondent was advised that its reading of the pertinent regulation was in error and that the generation and accumulation of these wastes was, in

fact, an activity regulated under the Act for which they should have notified the State and Federal agencies in their previous reports. Upon being advised of this fact, the Respondent immediately submitted a revised notification and Part A application and proceeded to transport the solvents off its premises to an authorized waste disposal facility.

My reading of this record would suggest the Respondent was guilty of essentially one act and that was the failure to notify the Agency of the existence of these wastes on its property. The fact that it failed to do so in several instances and under several different regulations does not in my judgement authorize the assessment of three separate penalties which, in essence, arise from the same factual situation. The Agency in this case was able to identify three separate ways in which the Respondent failed to notify the Agency of the existence of these solvents on its property. Perhaps a further investigation of the myriad regulations involved in these proceedings could have increased this number many-fold. In any event, it occurs to me that the failure to notify the Agency of the fact that it was generating these wastes on its premises was the Act for which a penalty should be assessed and the attempt by the Agency to assess multiple violations in penalties for what amounts to one act, is not authorized by the Agency penalty policy.

In this regard, it should be noted in calculating the penalty to be assessed for the failure to notify under § 3010 of the Act and the failure to include the solvents in its Part A application, the Agency purported to have found an example in the penalty policy which exactly fitted this situation and used the examples of penalties to be assessed appearing therein in making its calculations in this case. The hypothetical application of the policy, which the Agency used, appears on page 24 of the penalty policy and the first

portion thereof seems to track the situation of this case rather well since it gave an example of a company that notified the EPA that it conducted activities at its facilities involving hazardous wastes but they failed to advise the Agency that they were also storing hazardous waste. The hypothetical situation also went on to say that the company failed to file a Part A application and thus was operating without a permit or interim status. The Agency witness stated that he felt that this was a situation that exactly paralleled what occured in the instant case. However such is not the case at all. In the instant case, the Respondent did file the required notification and, in fact, did file a Part A application and enjoyed interim status, contrary to the situation set forth in the hypothetical example set forth in the penalty policy. It is interesting to note that in the description of how one should assess a penalty in that case, the guidance identified the failure to notify as being moderate in potential for harm and moderate in extent of deviation, for the reason that the facility was apparently well run and that they had, in fact, at least notified the Agency that they were in the business of handling hazardous wastes and, therefore, the Agency knew of their existence. The second portion of the violation was characterized by the document as "operating without a permit" for which another $6,500.00 penalty was suggested. If the penalty policy had followed the Region's logic in this case, it would have also assessed another $6,500.00 penalty for failure to notify of the fact that they were storing the solvents on the property in addition to the $6,500.00 for operating without a permit. The penalty policy, of course, did not do that.

Consequently I am of the opinion that only one penalty should be assessed against the Respondent in regard to its failure to notify the Agency of its generation of the solvents involved in this case. I am further of the opinion

that a penalty of $6,500.00 is appropriate for this violation since the hypothetical, above-identified, appearing in the penalty policy seems to be the appropriate example in this case. The analysis that the Agency, in regard to failure to notify under Section 3010 of the Act, is consistent with the penalty policy and the $6,500.00 proposed by the Agency is deemed by the Court to be reasonable and appropriate in this case.

Discussion of Complaint and Penalty Assessment

The Agency proposed to assess a penalty of $4,500.00 for certain discrepancies noted in two of the Respondent's manifests. The discrepancies were identified as: (1) one manifest was not signed by an agent of the Respondent; and (2) on the other manifest, there were some numbers scratched out and others inserted. Also the manifest appeared to identify forty drums of waste solvents as having been transported when, in fact, it was actually the contents of forty drums which were transported and not the drums themselves. The witness on behalf of the Agency, that calculated the penalties in this case, testified that at the time of the inspection they asked them to produce a signed copy of the manifest and they could not. That was one violation and then another manifest that they produced during the inspection covered a shipment of contaminated soil and it had some numbers scratched through and changed and "there was really no indication of what was really going on there". The witness testified that he viewed the extent of deviation as moderate and the potential for harm as moderate, arriving at a matrix cell range of from $5,000.00 to $8,000.00, the mid-point of which is $6,500.00 which the witness decreased to $5,000.00 since the discrepancies were explained and signed copies later produced. It was determined on cross-examination of this witness and also from witnesses for the Respondent that the inspectors were told that the person who normally takes care of the

manifests was out sick that day and they would make an attempt to find the manifests and produce them for the inspectors. The record reveals that one of the Respondent's officers who was unfamiliar with this portion of the operation attempted to find the final signed copy of the manifest but could only find a working copy which he produced for the inspector telling him that this was not the final manifest but only a working copy and that when the employee knowledgeable about these matters returned to the office they would provide EPA and the State agency with a copy of the signed manifest. Apparently such a signed manifest was immediately forwarded to the State agency upon the return of the employee who had responsibility for this function. As to the manifest which had numbers crossed out and others placed in involving the transportation of some contaminated soil, the witnesses for the Respondent explained this situation as follows. They initially calculated the weight of the material to be shipped by using standard engineering formulas and started to write in 30-some thousand pounds and then realized that the manifest called for tons so the amount 30 was scratched out and 18 placed thereon. Since the Respondent does not have a scale on its property of sufficient size to weigh the truck, it had to wait until the truck was actually weighed at an adjacent lumber yard and the actual weight of the shipped materials was then written in on the manifest as being 18.4 tons. Although the Court is aware of the fact that the so-called "paper violations" are an important aspect of the total regulatory scheme envisioned by Congress when it wrote RCRA, it seems to me that under the circumstances in this case, the Agency might have been a little over-zealous in view of the completely sensible and logical explanations given for the discrepancies. Under the circumstances and given the rational explanations provided by the Respondent, I am of the opinion that no penalty should be assessed for this violation.

The EPA witness who calculated the penalties in this case also testified as to how he arrived at the proposed penalties involving discrepancies in the waste analysis plan, violations in the training document, failure to make arrangements with the local fire department, and deficiencies in the inspection schedule. Apparently the Federal witness had no first-hand knowledge of these discrepancies but merely accepted, as true, the notations found on the State inspector's checklist. The discrepancies involved were apparently determined because the company had neglected to associate these documents with their application for a State operating permit and their absence in the State file was taken as proof of the fact that the documents did not exist at all. On cross-examination it was alleged that the documents were, in fact, available for inspection at the Respondent's facility and that no one asked to see them and that the reliance on the State checklist which in turn was based upon an examination of the materials the facility had filed with the State agency makes the penalty assessment in regard to these issues somewhat tenuous. However, the record does not touch on this point in so far as any of the Respondent's witnesses testifying that all of the documents in question were actually on the facility's premises available for inspection and they, in fact, did contain all of the information that the Agency found to be missing. In regard to the waste analysis plan, the Agency proposed a penalty of $270.00, for the violations in the training manual $500.00, for the failure to make arrangements with the local fire department $270.00, and for the discrepancies in the inspection schedule $500.00. Since some of the exhibits suggest that there were some deficiencies in these documents since the Respondent, subsequent to the inspection, advised the State that they would make the necessary corrections and provide the corrected documents to the State agency, I am of the opinion that the violations did, in fact, exist and the methodology used

by the Agency witness in calculating the proposed penalties associated with said violations appear to be consistent with the penalty guidance. I am of the opinion that the above-noted penalties are appropriate under the circumstances.

The Agency proposed to assess a penalty of $5,500.00 for the discrepancies which it identified in connection with the closure plans submitted by the Respondent to the State agency. According to the Agency's witness at the hearing, the two primary problems that the Agency had with the closure plan were: (1) that the plan did not address the solvents which the Respondent ultimately had shipped off its facility to a proper waste treatment facility; and (2) the fact that the closure process was begun less than 180 days after the closure plan was submitted to the State agency.

The question of the solvents has been dealt with above and I do not feel that any further discussion of that aspect of the closure plan deficiency is necessary since it is my opinion that all subsenquent failures relating to the solvent issue have been incorporated into the $6,500.00 penalty assessed above for failure to notify the State agency of the existence of the solvents on the premises in question.

As to the 180-day deficiency the witness testified that it was his information that the facility did not submit a closure plan to the State until December of 1983 and that the material was removed from the Respondent's property in January of 1984. Upon cross-examination and as supplemented by the record in this case, it appears that the closure plan was in fact submitted to the State of Florida in September of 1983 which, although is not 180 days prior to the time the material was shipped from the Respondent's facility, is certainly a longer period of time than the Agency witness assumed such notification took place. The witnesses for the Respondent also testified that

during a meeting with the State agency in 1983, at which time the various problems they were having with the State agency were discussed, the State gave them authority to proceed with the removal of the hazardous sludge from the facility and essentially waived the 180-day requirement. All of this information was apparently unavailable or unknown to the EPA official who calculated the proposed penalty in regard to this matter. When apprised of the actual facts surrounding this violation, on cross-examination, the EPA witness said that it was his opinion that even though the State agency had given authority to the Respondent to remove the material from its premises to an approved hazardous waste site that a penalty nonetheless exists since the regulations require 180-day notification prior to removal. There is some discrepancy between the witnesses as to what actually constitutes closure. The Respondent argues that its closure plan describes the initial removal of the hazardous sludge from its premises as a pre-closure operation and that the facility was not actually closed and certified to by the State agency until some time subsequent to January 1984. In any event, it occurs to me that inasmuch as the State of Florida was acting under its authority given by EPA during the negotiations described above, it had the authority to waive the 180-day notice if it felt that such action was consistent with the protection of the environment and the most expeditious way to remove and rid the Respondent's facility of the waste in question. Consequently, I am of the opinion that the penalty proposed for failure to have the closure plan submitted 180 days prior to the time initial removal of the material from the premises of the Respondent occurred is without merit and, therefore, will be dismissed.

One final observation in regard to the solvent problem. The record discloses that the facility only generated 200-250 gallons per year of the

solvents in question and that they had these spent solvents stored in drums on the premises. There is nothing in the record to suggest that the drums were defective or leaking in any manner and given the small quantity of this material generated each year, it occurs to me that their presence on the facility in the small quantities noted certainly do not pose a significant hazard to man or the environment. The EPA witness also admitted that a person could be confused by the language of the small generator rule but that it is established Agency policy that when a person proposes to avail himself of the exemption provided by that regulation he must add up all of the hazardous waste generated on his facility and see whether or not it exceeds the 1,000 pounds per month exemption number and if it does the small generator exception is not available to the facility operator even though he may only generate a small amount of a particular waste. The rationale behind this interpretation is reasonable since, as the EPA witness stated, a person could be generating small quantities of a large number of hazardous materials which individually do not amount to a great deal of waste but when totalled with all the other similarlysmall generated amounts of waste could amount to a sizeable quantity of hazardous materials. It is this rationale which the Agency employed in determining the violation in question and I have no quarrel with that interpretation. Although a facility, which in good faith makes a corporate decision based on a misinterpretation of Federal regulations, is not excused from a violation related to such regulation, the circumstances surrounding such misinterpretation should be taken into account by the Agency when it calculates a penalty to be associated with such violation. In this case, the Respondent was apparently acting on a good-faith misunderstanding of the regulations and made no effort to conceal the presence of the solvent wastes on its premises and readily pointed out to the State and Federal inspectors

what the drums in question contained and the amounts that it generated annually. It should also be noted upon being advised of their mistake in regard to their interpretation of the small quantity generator exemption the Respondent immediately filed an amended notification and Part A application and shortly thereafter had the solvents transported from their facility to an hazardous waste management site in Louisiana.

Conclusion

Based on the above discussion and analysis I am of the opinion that the following violations should be dismissed:

(1) the groundwater monitoring violations;

(2) the multiple violations concerning the solvent, leaving only the violation concerning the failure to notify;

(3) the manifest violations; and

(4) the closure plan violations.

The following penalties are assessed for the violations noted:

(1) for failure to notify the State agency of the fact that it generated and stored waste solvents on its property, pursuant to § 3010 of the Act, a penalty of $6,500.00 is assessed;

(2) for the discrepancies identified in the waste analysis plan, a penalty of $270.00 is assessed;

(3) for the violations associated with the training program, a penalty of $500.00 is assessed;

(4) for the failure to note arrangements made with local fire departments, a penalty of $270.00 is assessed; and

(5) for the failure to include all of the requirements associated with the inspection schedule, a penalty of $500.00 is assessed.

Upon consideration of the record, the conclusions reached herein and in accordance with the criteria set forth in the Act, I recommend the following:

PROPOSED FINAL ORDER[3]

I. Pursuant to § 3008(c) of the Act, 42 U.S.C. 6928(c), a civil penalty in the total sum of $8,040.00 is hereby assessed against Respondent, Martin Electronics, Inc.

II. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the Final Order upon Respondent by forwarding, by certified mail, to the USEPA - Region IV (Regional Hearing Clerk), Post Office Box 100142, Atlanta, Georgia 30384, a cashier's or certified check payable to the Treasurer, United States of America.

DATED: June 21, 1985

Thomas B. Yost
Administrative Law Judge

[3]40 CFR 22.27(e) provides that this Initial Decison shall become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal with 20 days after service of this Decision.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

85 JUL 2 AM 11:36

IN RE	)	
	)	RCRA-84-45-R
MARTIN ELECTRONICS, INC.	)	
	)	INITIAL DECISION
Respondent	)	CORRECTED PAGE 8

CERTIFICATION OF SERVICE

I hereby certify that true and correct copies of the foregoing corrected Page 8 of the Initial Decision issued by Honorable Thomas B. Yost on June 21, 1985 was served on the following: Craig H. Campbell, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery); Jeffrey F. Peck, Esquire, Martin Electronics, Inc., 5721 Dragon Way, Cincinnati, Ohio 45227; and Martin S. Seltzer, Esquire, Porter, Wright, Morris & Arthur, 37 West Broad Street, Columbus, Ohio 43215 (service by certified mail return receipt requested). Dated in Atlanta, Georgia this 1st day of July 1985.

Sandra A. Beck
Regional Hearing Clerk

cc: Hon. Thomas B. Yost

Hearing Clerk (A-110)
(for the Administrator)
U.S. Environmental Protection Agency
401 "M" Street, S.W.
Washington, D.C. 20460

Since the Respondent had entered into a valid consent decree with the State of Florida prior to the bringing of this action by EPA, the Respondent filed a motion to dismiss the complaint on the basis of res judicata since the primary subject matter of the complaint had been already concluded with the State of Florida and that, therefore, the Agency had no jurisdiction to bring another action based on the same violation. In support of the motion, the Respondent cited the Court's attention to a prior decision[1] by one of the EPA Administrative Law Judges on a similar fact situation arising in Region IX of EPA wherein the Judge upon a similar motion dismissed the complaint since it dealt with the same subject matter of a prior state/respondent consent decree. After reviewing the briefs and arguments of the parties on the issue, the undersigned denied the motion to dismiss on several grounds, not the least of which was that the cited decision had not been acted upon by the Administrator and, therefore, did not, at that point in time, represent final Agency action. Since the conclusion of the hearing in this case, however, the Agency has issued a final order[2] on the other case which decision is binding on the undersigned. A further discussion of this point will be made later in this decision.

The record indicates that on the occasion of the March inspection of the facility, prior to the issuance of the complaint, the groundwater monitoring system had been installed and a State inspection subsequent to the issuance of the complaint and, prior to the hearing, further indicated that the Respondent was in full compliance with all RCRA regulations.

[1] In Re BKK Corp., Docket No. IX-84-0012

[2] May 10, 1985.